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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970
No. [redacted] 35

ALLEN FRANK DAVIS
PETITIONER,
vs.
STATE OF ARKANSAS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1969
No. 527

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PETITIONER,
VS.
STATE OF ARKANSAS
RESPONDENT

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THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Both the majority and dissenting opinion of the Supreme Court of Arkansas have been properly noted in the Petition for Writ of Certiorari and have been set forth verbatim in the appendix which accompanies the petition.

JURISDICTION

The authority on which petitioner relies to invoke the jurisdiction of this Court is also contained in the petition.

STATEMENT

The petitioner, Allen Frank Davis, is presently an inmate in the Arkansas Department of Corrections. He was charged by felony information with the crime of first degree murder of his wife, Sharon Davis, in Garland County Circuit Court, Hot Springs, Arkansas. The killing occurred on January 19, 1967, and after a mental examination at the Arkansas State Hospital, petitioner was tried before a jury on June 11, 1968 and found guilty of first degree murder as charged.

On appeal to the Supreme Court of Arkansas, petitioner raised the same issues before this Court, his assignments of error were found to be without merit, and the case was affirmed, one judge dissenting. Since the jury made no recommendation for leniency, the death penalty was therefore mandatory.

ARGUMENT

It is submitted that the Petition for Writ of Certiorari does not disclose any substantial issue of law which warwants review by this Court. The record in this case fails to support the conclusion that petitioner was deprived of any right under the Constitution of the United States. Respondent is benefited by the studied and lengthy opinion of the Supreme Court of Arkansas affirming petitioner's conviction. This decision is correct and in accordance with the several pronouncements of this Court.

1.

Petitioner's absence during certain stages of the trial.

Petitioner contends that certiorari should be granted to determine whether he was denied due process by reason of not being present while certain matters were discussed in chambers with the trial judge. *Ark. Stat. Ann.* 43-2101 provides that a defendant must be present during his trial on a felony charge. However, his presence may be waived either by the defendant personally or by his counsel. *Nelson* v. *State,* 190 Ark. 1027, 82 S.W. 2d 519; *Walton* v. *State,* 233 Ark. 999, 350 S.W. 2d 302. The Arkansas Supreme Court noted in its opinion that the first conference in chambers was conducted by the Court before any proceedings were had. The Court also noted that all other such conferences were had at the request of the petitioner's counsel.

Upon a review of the record, the Arkansas Supreme Court concluded that there was no exclusion of petitioner from the conferences with the trial court in chambers. Respondent submits that the record supports the conclusion

of the Arkansas Supreme Court, and that this point is without merit. This point raises no substantial Federal question.

II.

The introduction of certain photographs.

Next, petitioner argues that certiorari should be granted to determine whether certain photographs of the scene of the crime should have been excluded. These photographs include pictures of the victim's mother, who was also shot and wounded in the perpetration of the murder of petitioner's wife.

Upon the introduction of pictures complained of, the Court instructed the jury that the pictures were to be considered only as descriptive of the testimony of the witnesses through whom they were introduced and not for any other purpose.

This cautionary instruction by the trial court was proper, and this position was upheld by the Supreme Court of Arkansas which stated that such photographs are admissible to describe and identify the premises and scene of the crime, to establish the corpus delicti, to disclose the environment of the crime at the time of commission, and to corroborate testimony. The introduction of the photographs, including the pictures of the victim's mother who was also wounded, are directly relevant to establish malice aforethought, deliberation, and premeditation, since it appears that the crime committed was contemplated by petitioner for some period of time. There is no error in this point. See also *Jones* v. *State*, 213 Ark. 863, 213 S.W. 2d 974, and *Stewart* v. *State*, 233 Ark. 458, 345 S.W. 2d 472. This point raises no substantial Federal question.

III.

The manner in which the trial jury was selected.

Petitioner argues that certiorari should be granted to review the voir dire examination of respective jurors, contending that the trial court erred in excusing certain jurors on the basis of *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968).

The *Witherspoon* decision was followed by *Williams* v. *Dutton,* 400 Fed. 2d 797 (1968) wherein the Court noted "... that *Witherspoon* concerns only the exclusion of persons who merely assert conscientous scruples against capital punishment. It does not prescribe the exclusion of venireman who states unequivocally that he would never impose the death penalty or that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt." A careful reading in this case will show that the trial court's exclusion of certain persons was on account of their inability to form an impartial judgment on the defendant's guilt by reason of their scruples against capital punishment. The jurors were extensively questioned by both the prosecution and the defense, and again by the trial court concerning these matters. The jurors excused for cause held to their position that they could not impose capital punishment in any event. The Supreme Court of Arkansas found this argument to be without merit, and respondent submits that this decision is correct. There is no substantial Federal question raised by this point.

IV.

The method to secure the death penalty and the death penalty itself are unconstitutional.

Petitioner contends that certiorari should be granted to consider whether the death penalty itself and the procedure by which it is inflicted are unconstitutional. This question was not presented to the Arkansas Supreme Court and for that reason should not be considered here. Further, the method and penalty are not unconstitutional, *Maxwell* v. *Bishop,* 398 F. 2d 138 (1968). See also *Bagley* v. *State,* 247 Ark. 113.

CONCLUSION

Petitioner's assignments of error and his arguments in favor of granting a Writ of Certiorari are entirely without merit. Certiorari should be denied.

Respectfully submitted,

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